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Ghost Bears: The Plight of the North Cascades Grizzly Bear

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Ghost Bears: The Plight of the North Cascades Grizzly Bear

Adam Bowler

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I. INTRODUCTION

The grizzly bear is one of the most frightening and iconic animals to roam the North American Continent, but the species fell from ecological dominance to the brink of extinction in less than two hundred years. What was once a thriving bear population is now relegated to several small pockets within the contiguous United States and at a fraction of population levels before western settlement. The story of the grizzly bear over the last forty years is one of an animal feared by humans, yet totally dependent upon their protection for its survival.

The remaining grizzly bears in the United States have been labeled as threatened under the Endangered Species Act and have benefited greatly because of this designation. Though controversial, it has been illegal to kill the bears for almost forty years, and this remains the subject of intense debate. The scientific and environmental community would like to see the bears restored to their historic ranges and population levels. Other groups, consisting mostly of ranchers, farmers, and other con-

cerned citizen groups, are less enthusiastic about having five hundred pound animals with three inch claws roaming their lands and potentially preying on livestock.

When taken into perspective, surprisingly little progress has been made during the era of federal protection in terms of species recovery. One or two pockets of bears have enjoyed a rebound, but across the nation the bears continue to reflect a symbol of a wild frontier long ago conquered, and a species long ago pushed to the furthest reaches of American wilderness. Grizzly bears have made substantial gains, but only in limited regions, and with no guarantees of repeated success in areas where recovery efforts have yet to begin.

State and Federal agencies have been developing and forging cooperative agreements with the unified goal of restoring grizzly bears in designated areas through the use of clear policy objectives and the backing of sound science. Agencies have taken great care to employ scientific methods that uphold the law and prescribe those actions that will most effectively return grizzly bears to their former ranges. The process is slow and can at times be quite contentious, but with the slow pace comes willful purpose. The agencies, scientists, and policy makers responsible for grizzly bear recovery efforts understand that all concerns must be heard and addressed in order to build a sustainable recovery that unifies rather than divides society.

Most of the focus on grizzly bear recovery has been in areas surrounding the Rocky Mountains of Montana and Wyoming. Washington State, once home to a substantial grizzly population, has yet to make significant gains in grizzly recovery. This may change in light of a National Park Service study currently underway, which seeks to determine whether the North Cascade Mountains can be home to a healthy grizzly bear population. If history is any indication of what the recovery process might look like in Washington, this study is just the beginning of what could be a decades-long process to bring back a fierce and controversial animal that once roamed the jagged mountains of the Northwest.

For reasons discussed later in this article, Washington State should overturn its current ban on grizzly importation and establish its place in the recovery process by fully collaborating with federal agencies. Interested parties need to get involved early on in the process, because overturning the ban will largely be determined by decisions made now, and by those entities best positioned to wield the most influence. Further, federal and state agencies will likely vie for control amidst the landscape of public concern. It is entirely possible that no decision will be made to bring grizzlies back to the North Cascades—or that bears should be imported into the state to seed new populations. But, if the region is deemed

suitable for recovery, no interested party will want to be watching from the sidelines as decisions which could have far reaching impacts are made without their input.

Washington State positioned itself against grizzly bear recovery more than twenty years ago when it passed a statute banning the importation of bears. At the time, there was not enough public support to withstand the passing of the bill, and there have been no legal challenges to the law. Because of a divergence between state and federal approaches to grizzly management in Washington State, the community may need to develop a new perspective on bear reintroduction. If the decision is made to move forward with repopulating grizzly bears in the North Cascades, the state should amend or overturn the ban on grizzly bear reintroduction because it will only work against state and private interests, and it will unnecessarily frustrate the recovery process. A resurging grizzly population would become a permanent fixture in the ecological landscape that will forever change how the rest of the world views and experiences the Northwest. Washington State should do everything within its power to be an integral part of that process.

This article will address the history of grizzly bears in the United States, what has been done at the federal level to deal with species decline, and the successful recovery of bears in the Yellowstone area. The article will then move to the current status of bears in the North Cascades, dangers involved with human-bear interactions, and to how Washington State should proceed with grizzly bear recovery.

II. GRIZZLIES IN NORTH AMERICA: A BRIEF HISTORY

The 1800s were a formative time for economic and social development in the Western United States. It was an era that placed settlers alongside many species of wild animals for the first time. Native species and pristine ecosystems suffered as a result, but in particular it was the beginning of the end for grizzly bear populations that had thrived from Mexico to modern day Alaska for thousands of years.¹ Some estimates put the pre-westward-expansion grizzly bear population in the United States somewhere between fifty thousand and one hundred thousand animals.² Bears were most often killed for their fur, but were also killed out

1. DR. CHRISTOPHER SERVHEEN, *U.S. FISH AND WILDLIFE SERVICE, GRIZZLY BEAR RECOVERY PLAN 1* (1993), http://www.fws.gov/mountain-prairie/species/mammals/grizzly/Grizzly_bear_recovery_plan.pdf [hereinafter SERVHEEN, RECOVERY PLAN].

2. *Id.*

of fear or as a result of human-bear conflict.³ Indeed the scientific name alone, *ursus arctos horribilis*, conveys a longstanding fear of grizzly bears.⁴

Historic records kept by one of the most iconic companies from the nineteenth century, the Hudson's Bay Trading Company, suggest that hunting of grizzly bears in the North Cascades and trade in their hides peaked in the mid-1800s.⁵ As the Northwest became increasingly settled and developed, the remaining pockets of grizzly bears disappeared because of habitat fragmentation and killings by humans.⁶ The last recorded killing of a grizzly bear in Washington was in 1967 near Fisher Creek.⁷ The last confirmed photograph of a grizzly bear in Washington, and the first in over fifty years, was taken in 2010 when a hiker happened to spot one in the North Cascades.⁸

By the 1970s, there were as few as several hundred grizzly bears, and not more than one thousand left in the contiguous lower forty-eight states.⁹ Today, the grizzly bear population has grown to somewhere between 1,500 and 1,800 bears as a result of some fairly successful recovery plans centered in Montana.¹⁰ Though grizzlies formerly ranged from the Great Plains to the Pacific Coast, in the lower forty-eight states they primarily reside in Montana and parts of Wyoming.¹¹ Today, grizzly bears only occupy approximately two percent of their historic ranges across the lower forty-eight states.¹²

Grizzly bears are highly adapted to their environment, but the overwhelming loss of access to and destruction of historic population ranges has made the idea of natural recovery extremely unlikely to be success-

3. DR. CHRISTOPHER SERVHEEN, *U.S. Fish and Wildlife Service, Grizzly Bear Recovery Plan, Supplement: North Cascades Ecosystem Recovery Plan Chapter 2* (1997), <http://www.fws.gov/mountain-prairie/species/mammals/grizzly/NorthCascadesSupplement1997.pdf>, [hereinafter SERVHEEN, CASCADE SUPPLEMENT].

4. *Environmental Conservation Online System: Grizzly bear (Ursus arctos horribilis)*, U.S. FISH & WILDLIFE SERVICE, <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A001> (last visited March 14, 2015).

5. SERVHEEN, CASCADE SUPPLEMENT, *supra* note 3, at 2.

6. *Id.*

7. *Id.*

8. Craig Welch, *Rare grizzly bear photographed in North Cascades*, SEATTLE TIMES (Jul. 2, 2011, 12:16 AM), <http://www.seattletimes.com/seattle-news/rare-grizzly-bear-photographed-in-north-cascades/>.

9. NOAH GREENWALD, CENTER FOR BIOLOGICAL DIVERSITY, PETITION FOR A RECOVERY PLAN FOR THE GRIZZLY BEAR (*URSUS ARCTOS HORRIBILIS*) ACROSS ITS NATIVE RANGE IN THE CONTERMINOUS UNITED STATES 6 (2014), http://www.biologicaldiversity.org/species/mammals/grizzly_bear/pdfs/Grizzly_Recovery_Plan_Petition_.pdf.

10. *Id.*

11. *Id.*

12. *Grizzly Bears and the Endangered Species Act*, NATIONAL PARK SERVICE, <http://www.nps.gov/yell/naturescience/bearesa.htm> (last updated Mar. 14, 2015).

ful.¹³ With the average grizzly weighing in at 400-600 pounds, they need to continually search for food, and are naturally wide-ranging and territorial animals.¹⁴ Grizzlies are omnivores with diets that reflect the food options available in their environment. For example, historic Yellowstone grizzly bear diets were 32% meat and 68% plant-based, while bears living along the Colombia River in Washington subsisted on diets of 60% salmon prior to the crash of salmon populations.¹⁵ But, in spite of their adaptable diets, bears would eventually need help from the federal government for the survival of their species. Such assistance came through listing the grizzly bear under the Endangered Species Act (ESA).

III. THE FEDERAL STRATEGY

The ESA relies on five factors to determine whether a species should be listed: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence.¹⁶ The goal of the ESA is to rehabilitate a threatened species to the level of a self-sustaining population that may one day be delisted.¹⁷ With that goal in mind, federal agencies were tasked with managing the remaining grizzly bear populations and any future recovery efforts.

In 1975, the U.S. Fish and Wildlife Service (FWS) listed the grizzly bear as threatened under the Endangered Species Act (ESA) across the contiguous lower 48 states, due in part to the dramatic reduction in territory occupied by the bears.¹⁸ A threatened species is one that is likely to become endangered in the foreseeable future in all or part of its range.¹⁹ The threatened designation provides federal protection by making it a crime to take a bear except in self-defense, to remove nuisance bears, or for scientific research.²⁰ Specifically, the threatened designation prohibits taking a bear, which means to “harass, harm, pursue, hunt, shoot, wound,

13. See, GREENWALD, *supra* note 9, at 17.

14. U.S. FISH & WILDLIFE SERVICE, *supra* note 4.

15. Charles T. Robbins, et al., *Grizzly Bear Nutrition and Ecology Studies in Yellowstone National Park*, YELLOWSTONE SCIENCE, Summer 2006, at 19, 21, available at [http://www.nps.gov/yell/planyourvisit/upload/YS14\(3\).pdf](http://www.nps.gov/yell/planyourvisit/upload/YS14(3).pdf).

16. 16 U.S.C. § 1533(a)(1) (2006).

17. NATIONAL PARK SERVICE, *supra* note 12.

18. *Id.*

19. 16 U.S.C. § 1532(20) (2006).

20. 50 C.F.R. § 17.40(b)(i) (2014).

kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²¹

The ESA requires that “the secretary shall develop and implement plans for the conservation and survival of endangered species.”²² Thus, one of the first major actions taken by the FWS after listing the grizzly bear was to write the Grizzly Bear Recovery Plan (the Recovery Plan), first completed in 1982, and later revised in 1993.²³ The Recovery Plan’s primary goal is the identification of actions necessary for grizzly bear recovery sufficient for eventual delisting from the ESA.²⁴ The Recovery Plan set specific recovery criteria, and listed the broad action items necessary to fulfill those criteria including reductions of human-bear conflict, limiting habitat loss, improving public relations, and continued research.²⁵

Although grizzly bears were listed as threatened in all of the lower 48 states, there are only five locations throughout Montana, Washington, Idaho, and Wyoming that are thought to have either remnant or stronger populations.²⁶ Additionally, the Bitterroot Mountains in Idaho and the San Juan Mountains in Colorado are known to have hosted grizzly bear populations in the past, but no bears can be found there now. The Recovery Plan focuses on and applies to all five populated regions, as well as the Bitterroot area, but excludes the San Juan Mountain region until further analysis can be done on habitat viability.²⁷ The aforementioned areas, known as recovery zones, were included in the Recovery Plan because of their historic populations, but most of the zones needed heavy recovery efforts to reach a sustainable population level.

To address the complexity of grizzly bear recovery, the decision was made to form a special committee, chartered under the U.S. Department of Agriculture and the U.S. Department of the Interior (DOI), called the Interagency Grizzly Bear Committee (IGBC).²⁸ The IGBC, formed in 1983 and led by the FWS, is comprised of representatives from U.S. Forest Service, the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Land Management, the U.S. Geological Survey, and state agencies tasked with grizzly bear management from

21. 16 U.S.C. § 1532(19) (2006).

22. 16 U.S.C. § 1553(f)(1) (2006).

23. SERVHEEN, RECOVERY PLAN, *supra* note 1, at ii.

24. *Id.*

25. SERVHEEN, RECOVERY PLAN, *supra* note 1, at ii–iii.

26. *Id.* at 10.

27. *Id.*

28. UNITED STATES DEPARTMENT OF AGRICULTURE AND UNITED STATES DEPARTMENT OF THE INTERIOR MEMORANDUM OF AGREEMENT TO ESTABLISH THE INTERAGENCY GRIZZLY BEAR COMMITTEE, <http://www.igbconline.org/images/pdf/Charter.pdf>.

Idaho, Montana, Washington, and Wyoming.²⁹ The committee set four goals for itself:

[T]o engage top level decision makers in a coordinated approach to recover grizzly bears through policy and procedures adopted by each member agency, to be implemented through each respective ecosystem subcommittee; to coordinate management and research actions of state and federal agencies related to the grizzly bear and to ensure the best utilization of available resources and prevent duplication of effort; to implement the Grizzly Bear Recovery Plan to facilitate recovery of grizzly bears; and to implement and oversee the management and research activities of recovered grizzly bear populations.³⁰

The formation of the IGBC was strategic as well as functional; wildlife managers and policy makers rightly expected much debate and disagreement about how exactly to conduct recovery efforts.

In the Recovery Plan, the FWS had attempted to address recovery criteria geared towards the eventual delisting of endangered bears for multiple geographic regions in one document. This approach, although thorough, was eventually challenged in court by an environmental group claiming that the plan did not meet the requirements of the ESA.³¹ According to the ESA, recovery plans are mandated to contain “objective, measurable criteria” for recovery that would result in a delisting once those criteria are met.³² The Recovery Plan listed three specific criteria for measuring population recovery: (1) sufficient reproduction to offset human-caused mortality; (2) adequate distribution of breeding animals throughout the zone; and (3) a limit on total human-caused mortality.³³ These criteria were incorporated into the plan as the basis by which recovery would be determined, and the delisting process could begin.³⁴

The plaintiffs challenging the recovery criteria argued that the Recovery Plan “must specifically assess whether the threats that originally led to a decision to list a species have been remedied in ways that would permit biological recovery of the listed species.”³⁵ In that case, the court held that recovery criteria must fully address the five factors bringing a species under the protection of the ESA before that species can be delist-

29. *More about the IGBC*, INTERAGENCY GRIZZLY BEAR COMMITTEE, (August, 28, 2012), <http://www.igbconline.org/index.php/who-we-are/about-the-igbc> [hereinafter *About IGBC*].

30. *Id.*

31. *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 102 (D.D.C. 1995).

32. 16 U.S.C. § 1533(f)(1)(B)(ii) (2006).

33. SERVHEEN, RECOVERY PLAN, *supra* note 1, at 19.

34. *Id.*

35. *Babbitt*, 903 F. Supp. at 111.

ed.³⁶ The court specifically reasoned that the FWS didn't explain how its goal of breeding-animal distribution addressed how much habitat and of what quality would be needed.³⁷ The court also noted that the FWS failed to demonstrate how developing and implementing a Conservation Strategy would adequately address the problem of relying on distribution data for determining recovery criteria.³⁸

The IGBC later developed Recovery Plans specific to each recovery area that would address the wide range of unique conditions.³⁹ The IGBC also created subcommittees responsible for the development and implementation of recovery plans specific to each recovery zone.⁴⁰ The Recovery Plans listed the following sequence of actions aimed at conservation and recovery within each zone: (1) identify population goals for each designated recovery zone, (2) provide for recovered population monitoring, (3) identify population and habitat limiting factors, (4) identify management measures needed to remove limiting factors, and (5) establish recovered populations where adequate habitat is available.⁴¹ These factors represented the guidelines adopted by the FWS as the best framework for describing a successful recovery program that could ensure a sustainable population of bears.⁴² No single agency was capable of carrying out this plan on its own, so the federal government sought to coordinate agencies with similar goals and responsibilities under one umbrella.

The FWS is responsible for enforcing the protection of land animals listed under the ESA, but the agency largely takes a managerial role and relies heavily on other agencies to meet its goals.⁴³ To address this fragmented approach, one agency needs to take the lead and coordinate recovery efforts because grizzly bears range across large areas covered by multiple jurisdictions. Such coordination helps to ensure efficiency and to prevent duplicative work that waste time and money, and may eventually harm the target species. Coordination also brings more funding and attention from leadership within agencies responsible for carrying out the Recovery Plan.⁴⁴ Early efforts at grizzly bear recovery often ran into jurisdictional problems and lacked funding within the given state and fed-

36. *Id.*

37. *Id.* at 112.

38. *Id.* at 112.

39. *Id.* at 118.

40. *IGBC Ecosystem Subcommittees*, INTERAGENCY GRIZZLY BEAR COMMITTEE, (Sept. 2012, 21:20), <http://www.igbconline.org/index.php/who-we-are/igbc-membership/ecosystem-subcommittees> [hereinafter *IGBC Subcommittees*].

41. SERVHEEN, RECOVERY PLAN, *supra* note 1, at 15.

42. *Id.*

43. *About IGBC*, *supra* note 29.

44. *Id.*

eral agencies, so the FWS developed the model strategy that is still in place today.⁴⁵

Since its inception, the IGBC has fostered continued research, community outreach, and provided guidance to public and private entities on issues like proper food waste storage, which is a major factor in reducing human-bear conflict.⁴⁶ The IGBC also individually revised the Recovery Plan for the North Cascade zone (NCE) in 1997⁴⁷ and for the Greater Yellowstone Area (GYA) in 2007.⁴⁸ The GYA revision included updates on recovery efforts and population monitoring techniques stemming from a recovering population.⁴⁹ For some groups, however, the government's focus on six limited recovery zones does not constitute an effort that is required by law, nor is it one sufficient for biologically sound grizzly bear recovery.

In the summer of 2014, the Center for Biological Diversity (CBD) submitted a petition to the DOI and FWS, under 16 U.S.C. § 1533(f) of the ESA⁵⁰ and 5 U.S.C. § 553(e) of the Administrative Procedures Act,⁵¹ requesting that the 1993 Grizzly Bear Recovery Plan be updated and revised to include all suitable habitat across the contiguous United States.⁵² The CBD claims that the FWS has failed to develop recovery strategies for all areas subject to ESA regulation, and that this failure has endangered the grizzly bear species as a "biological fact."⁵³ The petition represents what would be a colossal shift in scope and breadth of grizzly bear recovery efforts. Time will tell whether the FWS has the authority to acquiesce to the demands made in the CBD petition, but it is certain that shifting from a regional to a national recovery effort will require substantially more funds than have previously been available and a public relations campaign far beyond anything yet attempted for grizzly bear recovery.

45. *Id.*

46. *Id.*

47. SERVHEEN, CASCADE SUPPLEMENT, *supra* note 3, at 1.

48. DR. CHRISTOPHER SERVHEEN, U.S. FISH & WILDLIFE SERVICE, GYA GRIZZLY BEAR RECOVERY PLAN, SUPPLEMENT: HABITAT-BASED RECOVERY CRITERIA FOR THE YELLOWSTONE ECOSYSTEM 1 (2007), http://www.fws.gov/mountain-prairie/species/mammals/grizzly/Grizzly_bear_Recovery_Plan_supplement_HBRC.pdf.

49. *Id.* at 4.

50. 16 U.S.C. § 1533(f) (2006).

51. 5 U.S.C. § 553(e) (2006).

52. GREENWALD, *supra* note 9, at 3.

53. *Id.* at 2.

IV. YELLOWSTONE GRIZZLY BEARS: A SUCCESS STORY

The Yellowstone National Park area is home to the most robust population of grizzly bears in the contiguous lower 48 states.⁵⁴ From the time it was listed in 1975 until 2006 when the Recovery Plan was last officially revised, the GYA grizzly population grew from less than 200 to approximately 593 bears.⁵⁵ Not only is this an example of a successful recovery program, but it is also significant because studies have determined that the GYA may have already reached its carrying capacity—the point at which an ecosystem is likely unable to sustain continued growth—for grizzly bears.⁵⁶ Growth became an issue, and prompted revisions to the Recovery Plan, because original population goals were based on recovery rather than population stability.⁵⁷ No species can grow forever, and by 2006, the grizzly bear had finally recovered enough to warrant delisting from the ESA.

Dr. Christopher Servheen, the Grizzly Bear Recovery Coordinator for the FWS and primary contributor to the 1993 Recovery Plan revision, played a key role in the most successful grizzly bear recovery effort in U.S. history.⁵⁸ Dr. Servheen has been the Grizzly Bear Coordinator for the FWS for almost three decades; he has been responsible for coordinating all research and management of grizzly bears in the lower 48 states and has authored many scientific and policy documents in support of grizzly bear recovery.⁵⁹ One of his most significant, and hotly contested contributions, was the final rule delisting the Yellowstone grizzly bear population in 2007. In its final rule, the FWS listed several reasons for the delisting which included a strong population, new methods of monitoring mortality rates, and agreements with other federal agencies to protect forest habitats.⁶⁰ Many of these factors, and the interagency support necessary for a functioning recovery plan, had been outlined in 2000 in a

54. NATIONAL PARK SERVICE, *supra* note 12.

55. *Id.*

56. DR. CHRISTOPHER SERVHEEN, U.S. FISH & WILDLIFE SERVICE, GRIZZLY BEAR RECOVERY PLAN, DRAFT REVISED SUPPLEMENT: REVISED DEMOGRAPHIC RECOVERY CRITERIA FOR THE YELLOWSTONE ECOSYSTEM 6 (2013), http://www.fws.gov/mountain-prairie/species/mammals/grizzly/Grizzly_Bear_Recovery_Plan_March2013.pdf [hereinafter SERVHEEN, DRAFT YELLOWSTONE SUPPLEMENT].

57. *Id.*

58. *See* SERVHEEN, RECOVERY PLAN, *supra* note 1, at i.

59. *Faculty & Staff: Chris Servheen*, UNIVERSITY OF MONTANA, <http://www.cfc.umt.edu/personnel/details.php?ID=1153> (last visited Mar. 14, 2015).

60. Endangered and Threatened Wildlife and Plants; Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife; 90-Day Finding on a Petition To List as Endangered the Yellowstone Distinct Population Segment of Grizzly Bears, 72 Fed. Reg. 14866 (March 29, 2007) (to be codified at 50 C.F.R. pt. 17).

very important memorandum of agreement between key agencies called the Greater Yellowstone Conservation Strategy.⁶¹

The IGBC Strategy Team produced and relied upon the Greater Yellowstone Conservation Strategy not only to improve grizzly bear recovery, but to outline how to transition from a federally protected population to one delisted from the ESA, ultimately to be managed by state and local agencies.⁶² In the Conservation Strategy document, the FWS detailed how it would ensure management of bears that would protect existing populations while also ensuring the protection of habitat vital to species survival.⁶³ This document is significant in that it demonstrates the evolution of grizzly bear conservation which relies upon support from many federal and state agencies, all adopting the same vision of how to restore a threatened population.⁶⁴

The delisting of a recovered species is the ultimate goal of ESA protection and should be a celebrated occasion. However, in the case of the Yellowstone grizzly, it was not universally well received. On March 22, 2007, the FWS announced that the GYA grizzly bear had recovered and that it would accordingly be delisted, removing the federal protections which had been in place for over thirty years.⁶⁵ The rule alarmed some groups, and eventually led to a legal challenge brought by several entities including the Greater Yellowstone Coalition (The Coalition). The action to delist the grizzly bear identified a distinct population segment (DPS) in the GYA, which left all other bears in the lower 48 states listed as threatened.⁶⁶

The Coalition, a non-profit dedicated to wildlife preservation, filed suit in the U.S. District Court of Montana alleging, among other things, that the FWS' decision to delist the grizzly bear was arbitrary and capricious because: (1) the delisting failed to account for impacts to mortality caused by changes in food resources due to whitebark pine destruction brought on by climate change, and (2) the regulatory mechanisms in place were insufficient to protect and sustain grizzly bear population lev-

61. INTERAGENCY CONSERVATION STRATEGY TEAM, FINAL CONSERVATION STRATEGY FOR THE GRIZZLY BEAR IN THE GREATER YELLOWSTONE AREA (2007), http://www.fws.gov/mountain-prairie/species/mammals/grizzly/Final_Conervation_Strategy.pdf [hereinafter FINAL CONSERVATION STRATEGY].

62. *Id.* at 14.

63. *Id.* at 12.

64. *Id.*

65. *Grizzly Bear Recovery: Yellowstone Ecosystem*, U.S. FISH & WILDLIFE SERVICE (updated Dec. 16, 2014), http://ecos.fws.gov/tess_public/pub/speciesRecovery.jsp?sort=1.

66. Reinstatement of Protections for the Grizzly Bear in the Greater Yellowstone Ecosystem in Compliance With Court Order, 75 Fed. Reg. 14496, (March 26, 2010) (to be codified at 50 C.F.R. pt. 17).

els.⁶⁷ The district court ruled in favor of the Coalition, and the FWS appealed to the Ninth Circuit Court of Appeals, which upheld in part and reversed in part.⁶⁸ On appeal, the court found that the agency's decision to delist the grizzly bear failed to connect the justification to do so with available data suggesting that whitebark pine nut had not been properly evaluated for its potential impact on grizzly bear mortality.⁶⁹ Alternatively, the court found that regulatory mechanisms in place were in fact sufficient to protect grizzly bear populations once delisted.⁷⁰

The court reviewed the agency's adherence to the ESA under authority from the Administrative Procedure Act (APA).⁷¹ Under the APA, the court could only set aside an agency decision found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁷² In *Greater Yellowstone Coalition*, the court found not that the FWS had erred in its judgment, but rather that it had simply failed to account for a variable food source that was of *prima facie* importance to a full and thorough analysis. The court reasoned that the FWS may not argue that grizzly bears would adapt and find food in other areas within the primary conservation area, exclusive of the whitebark pine tree forests, while also claiming that bear recovery depended on utilization of the entire area.⁷³

Following the 2009 district court ruling in favor of the Coalition, an order vacating the rule delisting the GYA grizzly bear was issued and the bear was once again protected under the ESA.⁷⁴ A 2011 court of appeals decision affirmed the district court ruling in part, and in 2013 the FWS again requested review and input on revisions to demographic data in the GYA Grizzly Bear Recovery Plan.⁷⁵ The grizzly bear is still protected in all 48 states under the ESA, but Wyoming is beginning the process of asking for a rule delisting grizzlies in that state.⁷⁶ In spite of the legal setback, the case of the Yellowstone grizzly bear is one of success. Grizzly bears were restored to healthy population levels not seen in several generations, and a plan to delist bears as threatened for the first time in over

67. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1019 (9th Cir. 2011).

68. *Id.*

69. *Id.* at 1020.

70. *Id.*

71. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 901 (9th Cir. 2002).

72. 5 U.S.C. § 706(2)(A) (2006).

73. *Greater Yellowstone Coal., Inc.*, 665 F.3d at 1028.

74. Reinstatement of Protections for the Grizzly Bear in the Greater Yellowstone Ecosystem in Compliance With Court Order, 75 Fed. Reg. at 14496.

75. U.S. FISH & WILDLIFE SERVICE, *supra* note 65.

76. Scott Streater, *Wyoming Governor Pushing Jewell to Quickly Delist Yellowstone Grizzlies*, WYOFIL.COM (May 27, 2014), http://wyofile.com/ee_daily/wyo-governor-pushing-jewell-quickly-delist-yellowstone-grizzlies/.

forty years was tested and nearly passed into law, likely setting the path for future efforts to come.

V. THE NORTH CASCADES: PAST AND PRESENT

Efforts to restore the grizzly bear in the North Cascades have not borne any resemblance to the successes seen in the Yellowstone area. In 1991, the IGBC designated the North Cascade Mountains in Washington State as a recovery zone, but population gains similar to those in the GYA have not been realized, nor were they expected.⁷⁷ The North Cascade Grizzly Bear Recovery Zone (NCE) has an estimated population of fewer than twenty bears, and credible sightings have been limited.⁷⁸ The elusive nature of this remaining population has led some to label them “ghost bears.”⁷⁹ It has been determined that because population levels are so low, recovery in the NCE is likely impossible without increased recovery efforts.⁸⁰ Washington State adopted a rule listing the grizzly bear as an endangered species under state law, but the designation does little else than codify the bear’s precarious status.⁸¹

Beyond population levels, the NCE differs from the GYA in other significant ways. To begin with, the NCE is equal in size to both the Northern Continental Divide Ecosystem (NCDE) and GYA recovery zones combined.⁸² The NCE is over 9,500 square miles and consists of federal lands (85%), state lands (5%), and private lands (10%).⁸³ Additionally, the communities that exist in and around the NCE recovery zone are not used to living with grizzlies in their midst, as compared to the GYA which has had populations of bears for decades. This point is important because some of the greatest concerns regard human-bear conflict, which is mostly avoided with extensive public outreach and training. Furthermore, the most vocal protests will likely (and understandably) come from ranchers and farmers concerned about impacts to their livelihoods.

Lastly, the NCE has languished behind other areas in terms of funding, and as a result, has not had the requisite studies completed to begin

77. *Grizzly Bear Recovery: Northern Cascades Ecosystem*, U.S. FISH & WILDLIFE SERVICE (Dec. 19, 2012), http://ecos.fws.gov/tess_public/pub/speciesRecovery.jsp?sort=1.

78. *Id.*

79. Sandi Doughton, *Effort to restore grizzly bears in north cascades gets rolling*, SEATTLE TIMES (Aug. 22, 2014, 9:22 PM), http://seattletimes.com/html/localnews/2024363037_grizzlyrecovery.xml.html.

80. SERVHEEN, CASCADE SUPPLEMENT, *supra* note 3, at 9.

81. WASH. ADMIN. CODE § 232-12-014 (2015).

82. SERVHEEN, CASCADE SUPPLEMENT, *supra* note 3, at 21.

83. SERVHEEN, CASCADE SUPPLEMENT, *supra* note 3, at 19.

the implementation of the Recovery Plan.⁸⁴ However, in 2014, the NPS announced that it would begin conducting an environmental impact statement (EIS) to determine the impacts of bringing grizzlies back to the North Cascades.⁸⁵ The study is mandated by the National Environmental Policy Act which requires an EIS for any federal action that may have an impact on the environment.⁸⁶ The study will consider several options for grizzly bear recovery, including doing nothing at all.⁸⁷

The NCE has one additional difference that may prove to be a significant hurdle that could complicate recovery efforts or unnecessarily drag out the process. In 1994, the Washington State legislature passed S.B. 6387 with the description, “providing for grizzly bear management.”⁸⁸ The bill, codified under RCW 77.12.035, requires the Washington Department of Fish and Wildlife to cooperate with federal agencies on matters of species protection, but it expressly bans the importation of grizzly bears into the state.⁸⁹ The bill purports to provide protections for grizzly bears, but limits recovery to populations which are native to Washington State.⁹⁰ Indeed, the record of testimony in favor of the bill (two backcountry horsemen representatives, and one from the Washington Cattlemen’s Association) denotes the lines of conflict which may arise in the future, should a recovery plan go forward that is not built around cooperation and inclusivity.⁹¹ A total ban on grizzly bear importation by state agencies will likely prove problematic because, if past successes are a guide for future efforts, interagency cooperation will play a pivotal role.

Infighting and intentional delays within the IGBC Cascade Subcommittee, caused by state agency actors, has proven to be a significant factor in those agencies’ ability to seriously address recovery efforts. In his book, *Grizzly Wars: The Public Fight over the Great Bear*, author

84. Doughton, *supra* note 79.

85. *Effort to restore grizzlies in North Cascades gets rolling*, THE SEATTLE TIMES (last updated Aug. 22, 2014, 9:22 PM), <http://www.seattletimes.com/seattle-news/effort-to-restore-grizzlies-in-north-cascades-gets-rolling/>.

86. 42 U.S.C. § 4332.

87. North Cascades Ecosystem Grizzly Bear Restoration Plan/Environmental Impact Statement, Washington, 80 Fed. Reg. 8894 (Feb. 19, 2015), *available at* http://parkplanning.nps.gov/showFile.cfm?projectID=44144&MIMEType=application%252Fpdf&filename=NCE%20Grizzly%20Bear%20Restoration%20Plan%20EIS%20Notice%20of%20Intent%202015_02_19%2Epdf&sfid=203554.

88. COMMITTEE ON NATURAL RESOURCES, S. B. REP.-S.B. 6387, at 1. (Wash. 1994), *available at* <http://apps.leg.wa.gov/documents/billdocs/1993-94/Pdf/Bill%20Reports/Senate/6387.SBR.pdf>.

89. WASH. REV. CODE § 77.12.035 (2000).

90. *Id.*

91. SENATE COMMITTEE ON NATURAL RESOURCES, S. 53-S.B. 6387, 1st Special Sess., at 1-2 (Wash. 1994), *available at* <http://apps.leg.wa.gov/documents/billdocs/1993-94/Pdf/Bill%20Reports/Senate/6387.SBR.pdf>.

and attorney David Knibb describes efforts by state biologists in the early 1990s to contribute to analysis aimed at establishing a grizzly bear recovery zone in Washington.⁹² Knibb elucidates an intra-agency dynamic that pits the IGBC North Cascades subcommittee chairman, biologist Jon Almack, against his superiors in a struggle for control over how the recovery effort should proceed.⁹³ Almack had been integral in initial studies on the Washington bear population and habitat, and as chairman he was certain to remain influential for some time.

Frustratingly, Almack describes several stall-tactics employed to prevent recovery efforts from moving forward. For example, various important procedural meetings were bogged down by endless discussions of minute details seemingly intended to absorb enormous amounts of time in order to limit substantive progress.⁹⁴ Superiors would routinely dismiss or deny evidence that grizzlies could potentially thrive in the North Cascades.⁹⁵ Additionally, restrictions were placed on cooperation with other agencies (primarily Canadian agencies).⁹⁶ Worst of all was the replacement of Almack as chair of the Cascade Subcommittee by another biologist who specialized in reptiles and amphibians—not bears. After the replacement chairman stepped down, Almack had an opportunity to ask him if he had been given any orders to follow during his term. The response Almack received was beyond disheartening: “I was told to go as slow as I possibly could.”⁹⁷

VI. FIGHT OR FLIGHT: THE HUMAN-GRIZZLY CONFLICT

Probably the greatest source of public reservation about having grizzly bears as neighbors is the fear of human-bear conflict. No other animal in the United States so well represents the uncontrollable wild, reminding us that we are not at the top of the food chain. This sentiment, however, is ironic when one considers the extent to which the species has been killed, and nearly obliterated. Polls suggest that the public is generally in favor of grizzly bear reintroduction, but not all segments of Washington society are eager to bring back the grizzly bear.⁹⁸ While naturalists and biologists generally rejoice at the notion of bears returning to the Cascade Mountains, ranchers and farmers naturally fear for the safety of their livestock, and for their livelihoods. Indeed, public comments on the

92. DAVID KNIBB, *GRIZZLY WARS: THE PUBLIC FIGHT OVER THE GREAT BEAR* 67 (2008).

93. *Id.* at 65–68.

94. *Id.* at 65.

95. *Id.* at 63.

96. *Id.* at 65–66.

97. *Id.* at 68.

98. *People's Perception of Grizzlies: 2005 Survey*, WESTERN WILDLIFE OUTREACH, <http://westernwildlife.org/grizzly-bear-outreach-project/peoples-perception/> (last visited Mar. 15, 2015).

NCE Grizzly Bear Restoration Plan were published by the NPS with responses ranging from full support, to people expressing outrage and fear.⁹⁹ The fear of human-grizzly conflict on the hiking trail, as well as attacks on livestock, are worthy of consideration.

It is natural for people entering grizzly country to be wary of being attacked or injured by a bear. However, the chance of being hurt by a grizzly bear is incredibly low; from 1980 to 2014, over 100 million people visited Yellowstone National Park with a total of two grizzly-caused human injuries in developed areas, and thirty four in backcountry areas.¹⁰⁰ The chance of a park visitor being injured in developed areas is once every eighteen years, with variability depending on the types of areas visited within the park.¹⁰¹ Encounters with bears that result in injuries are incredibly rare, thanks in large part to better management methods that reduce the chance of human-bear conflict, such as the elimination of garbage scavenging opportunities for bears.¹⁰² Bear resistant garbage cans have been developed and deployed in grizzly country, in conjunction with the elimination of open pit landfills, to greatly reduce the dependence of bears on human sources of food.¹⁰³ Although successful overall, these measures have not been able to eliminate the risk of fatalities caused by grizzly bears.

In 2011, two hikers were killed in Yellowstone on separate occasions and were the first grizzly-caused human fatalities in the park in over twenty five years.¹⁰⁴ In the first incident, a hiker was killed while hiking with his wife on a backcountry trail when they surprised a mother grizzly bear and her two cubs.¹⁰⁵ The hikers ran, likely triggering the chase instinct in the bear, and the male hiker was bitten on the leg and eventually died from his injuries.¹⁰⁶ The second fatality occurred when a lone hiker happened upon the same bear (later proved by DNA testing) about a month after the first fatality.¹⁰⁷ More recently, a day hiker was

99. *NCE Grizzly Bear Restoration Plan/EIS Public Scoping Comment Summary Documents*, NATIONAL PARK SERVICE, <http://parkplanning.nps.gov/document.cfm?parkID=327&projectID=44144&documentID=66506> (last visited Oct. 11, 2015).

100. *Bear Inflicted Human Injuries and Fatalities in Yellowstone*, NATIONAL PARK SERVICE, (Mar. 14, 2015), <http://www.nps.gov/yell/naturescience/injuries.htm>, [hereinafter NATIONAL PARK SERVICE, FATALITIES IN YELLOWSTONE].

101. *Id.*

102. FINAL CONSERVATION STRATEGY, *supra* note 61, at 23.

103. *Id.*

104. *Rebounding Grizzlies Still Face, and Pose, Risks*, AUDUBON MAGAZINE, <http://www.audubonmagazine.org/articles/conservation/rebounding-grizzlies-still-face-and-pose-risks> (last visited Mar. 15, 2015).

105. *Id.*

106. *Id.*

107. *Id.*

killed by a grizzly bear with two cubs while hiking alone in Yellowstone.¹⁰⁸ Typical of fatal attacks on humans, the mother bear was later identified and euthanized as a precaution to other park guests.¹⁰⁹

The attacks in 2011 and two fatalities that occurred in 2010 outside the park sparked some public concern that grizzly bears were beginning to target humans as a food source.¹¹⁰ When asked about whether the attacks were part of a trend to view humans as food, Chris Servheen claimed that “there’s no connection between any of these attacks and food sources,” and that “it’s irresponsible for people to make conclusions like that.”¹¹¹ In spite of the horror induced by the thought of being mauled by a grizzly bear, the chance of being killed by a bear in Yellowstone (black or grizzly) is only slightly higher than that of being struck by lightning.¹¹²

The chances of being attacked are somewhat higher for livestock, however. Two of the more powerful segments of society generally opposed to and wary of grizzly bear recovery are the ranching and farming industries. Ranchers and farmers are uniquely positioned for conflict with grizzlies because their livelihood involves placing a readily accessible food source in direct contact with grizzly bears. The numbers of livestock lost to predation are relatively low, however, and represent a much smaller source of loss for ranchers than other natural phenomena like severe weather.¹¹³ Total estimated losses of cattle to grizzly bears in Montana between 1999 and 2006 are 130, and the combined average annual losses for cattle and sheep in Montana and Idaho is eighteen animals per year.¹¹⁴ Though the number of animals killed by bears is relatively low compared to other sources, ranchers understandably find it hard to sit idly by and watch their animals fall victim to predation.¹¹⁵

In 1982, a rancher named Richard Christy leased some land near Glacier National Park in Montana to graze his herd of sheep, which numbered somewhere around 1,700.¹¹⁶ Shortly after Christy began working the land with his sheep, grizzly bears started attacking the herd on a

108. NATIONAL PARK SERVICE, FATALITIES IN YELLOWSTONE, *supra* note 100.

109. *Female Grizzly Bear In Yellowstone Put To Death After Killing Hiker*, NPR.ORG, (Aug. 13, 2015), <http://www.npr.org/sections/thetwo-way/2015/08/13/432146758/female-grizzly-bear-in-yellowstone-euthanized-after-killing-hiker>.

110. AUDUBON MAGAZINE, *supra* note 104.

111. *Id.*

112. NATIONAL PARK SERVICE, FATALITIES IN YELLOWSTONE, *supra* note 100.

113. MINETTE JOHNSON, DEFENDERS OF WILDLIFE, PLACES FOR GRIZZLY BEARS: A BLUEPRINT FOR RESTORATION AND RECOVERY IN THE LOWER 48 STATES 9 (2006), *available at* http://www.defenders.org/publications/a_place_for_grizzlies.pdf.

114. *Id.*

115. *Id.* (among other sources of the kills, a single storm killed nearly 8,000 cattle in 1997).

116. *Christy v. Hodel*, 857 F.2d 1324, 1326 (9th Cir. Mont. 1988).

nightly basis.¹¹⁷ After various attempts failed to scare the bears away permanently, Christy fired at and killed a bear that was threatening to once again attack his herd.¹¹⁸ As a result, the DOI assessed a \$3,000 civil penalty against Christy for knowingly killing a grizzly bear in violation of the ESA.¹¹⁹ Christy reported the loss of twenty sheep at a value of around \$1,200 at the time the bear was killed.¹²⁰

In *Christy v. Holder*, it was argued that Christy's constitutional right to defend his property was violated by the prohibition against killing bears, enforced under the ESA.¹²¹ An injunction was sought to prevent enforcement of the relevant portions of the ESA against Christy's right to defend his property.¹²² Christy gave several reasons that his constitutional rights were violated, and among others, he claimed that he was deprived of his property without just compensation or due process, and that he was deprived of equal protection of the laws.¹²³ Additionally, Christy argued that "the ESA contained an unconstitutional delegation of legislative power to the Secretary and that the Secretary exceeded his delegated authority in promulgating the regulations."¹²⁴ The defense was successful and the court granted summary judgment; Christy appealed to the Ninth Circuit Court of Appeals in 1988.¹²⁵

The Ninth Circuit took the case and affirmed the district court's judgment ordering payment of a reduced civil penalty in the amount of \$2,500.¹²⁶ The court was reluctant to find a Fifth Amendment right to protect one's property by killing a federally protected species, and so again ruled in favor of the DOI.¹²⁷ In its analysis, the court said that "the right to kill federally protected wildlife in defense of property is not 'implicit in the concept of ordered liberty' nor so 'deeply rooted in this Nation's history and tradition' that it can be recognized by us as a fundamental right guaranteed by the Fifth Amendment."¹²⁸ The court then turned to whether the DOI had acted under an unconstitutional delegation of authority under the ESA. Applying the rational basis test, the court found the regulations enacted under the ESA upheld congressional intent

117. JOHNSON, *supra* note 113, at 9.

118. *Christy*, 857 F.2d at 1326.

119. *Id.*

120. *Id.*

121. *Id.* at 1327.

122. *Id.*

123. *Id.*

124. *Christy*, 857 F.2d at 1327.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 1330.

to reverse or prevent species extinction, and that the prohibitions on killing grizzly bears clearly advanced these goals.¹²⁹

While case law preventing defense of private property against losses from bears may be well-established, individuals are not without alternative remedies. The federal government may provide compensatory funds to individuals suffering losses in states with cooperative agreements. There are also several private groups that raise funds to donate to private parties with the goal of fostering support for grizzly bears by paying for damage that they occasionally cause. These and other remedies will be essential to any recovery plan set forth for the North Cascade region.

VII. THE WAY FORWARD: HOW WASHINGTON CAN PREPARE FOR GRIZZLIES

Washington State has made it clear that it wants to be included in any federal process to restore grizzly bears in the North Cascades and that it wishes its ban on grizzly importation to be respected.¹³⁰ In order to achieve a successful recovery in the North Cascade region of Washington State, many well-established lessons will need to be followed. The IGBC has proven that its model of interagency cooperation and continual emphasis on scientific review are effective at producing results. However, the Yellowstone area is not the North Cascades. The recovery areas in Montana contained established populations of bears and were surrounded by considerably lower human populations. Also, Montana did not have to contend with bans on grizzly imports. The North Cascade Subcommittee will need to adapt to these challenges.

The first major step that should be taken is to address the state law forbidding the importation of grizzlies into Washington. Although it has been conceded that federal plans to reintroduce bears are not dependent upon state cooperation, and may move forward without state consent, the state will abstain from the process to its own detriment. States that have precluded their own involvement in the reintroduction of controversial species have tended to regret the decision to do so.¹³¹ State bans slow things down and divest control from the state to federal agencies, but do not ultimately prevent reintroduction.

Idaho is a prime example; it effectively banned state participation in wolf recovery, and allowed the Nez Perce Indian Tribe to collaborate

129. *Id.* at 1330–1331.

130. North Cascades Ecosystem Grizzly Bear Restoration Plan/Environmental Impact Statement: Public Scoping Comment Analysis Report, NATIONAL PARK SERVICE, US FISH & WILDLIFE SERVICE at 27, 67 (June 2015), available at <http://parkplanning.nps.gov/document.cfm?parkID=327&projectID=44144&documentID=66506>.

131. KNIBB, *supra* note 92, at 121.

with the FWS in managing the recovery program.¹³² In the 1990s, the Idaho legislature continually moved to block and slow down wolf recovery plans, which forced the federal government to seek a more willing partner.¹³³ However, the state and Nez Perce would eventually sign a memorandum of agreement on grey wolf recovery coordination efforts, which helped to distance the state from federal control.¹³⁴ The importation of bears into Washington may have been thwarted or slowed for a time, but the continued existence of RCW 77.12.035 will only do harm to the state. If the FWS determines that recovery in the North Cascades is necessary under the ESA, the state ban will limit the most important tool left to the state—control.

Following the IGBC model, the North Cascades Subcommittee should seek out the best available science in developing a recovery plan, but it should also employ the greatest level of public support and participation available.¹³⁵ A successful program will need to include public hearings, public notice, and educational outreach efforts that incorporate cooperation at the state and federal level.¹³⁶ Another available option, should it be necessary, would be to label the reintroduction of grizzly bears in Washington under an experimental status in an effort to make the process more flexible and amenable to the public.¹³⁷ In Montana, a group of wolves were relocated from Canada in an effort to rehabilitate the species in that state.¹³⁸ It was determined that in order for the program to be successful, the authority to kill problem wolves would need to be granted for this specific population.¹³⁹ The problem arose from the fact that animals are declared protected under the ESA, regardless of where they came from, and whether they might not have been protected prior to relocation.¹⁴⁰

In a strange legal battle that pitted the farming industry, alongside some environmental groups, against the FWS, it was argued that species listed under the ESA could not have their status lowered to justify killing

132 *Id.*

133. Patrick Impero Wilson, *Wolves, Politics, and the Nez Perce: Wolf Recovery in Central Idaho and the Role of Native Tribes*, 39 NAT. RESOURCES J. 543, 552 (1999).

134. IDAHO DEPARTMENT OF FISH & GAME, MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF IDAHO AND THE NEZ PERCE TRIBE CONCERNING COORDINATION OF WOLF CONSERVATION AND RELATED ACTIVITIES IN IDAHO 2 (2002), *available at* <http://fishandgame.idaho.gov/public/docs/wolves/memoOfAgreement2.pdf>.

135. *About IGBC*, *supra* note 29.

136. *Id.*

137. KNIBB, *supra* note 92, at 47.

138. *Id.*

139. *Id.*

140. *Id.*

an animal.¹⁴¹ The FWS was ultimately successful. It retained the authority to alter the status of a local population because the goal of the ESA is to rejuvenate an entire species, not to protect individual animals at all costs.¹⁴² Though this method is somewhat extreme, it could prove useful if concerns about damage from grizzly bears could not otherwise be alleviated for recovery in the NCE. It would be unlikely that an agency would opt for this procedure as it could potentially limit the recovery process by restricting it to a small experimental group.

Addressing funding issues will be of vital importance. While there are currently no established federal programs that compensate for grizzly-livestock kills, future access to grant money may turn on state involvement. In 2014, the FWS announced the availability of over \$900,000 in grant money for states that helped livestock producers participate in non-lethal activities designed to limit predation from wolves.¹⁴³ Washington was one of ten states to receive grant money from the program.¹⁴⁴ If the Washington Department of Fish and Wildlife refuses, or is unable to sign an agreement because of state law, it could have a negative impact on people who live in and around grizzlies in the form of depriving injured parties of otherwise available funds. The reintroduction of bears will likely raise fears of undue costs for local ranchers and signing an agreement with the FWS would work to alleviate these fears.

In addition to federal funds, the state should consider setting aside its own fund for future damage payouts. The state already has a fund set up for damage to livestock caused by wolves, so it seems reasonable that such a fund could be duplicated to pay for grizzly bear damage.¹⁴⁵ As previously discussed, damage to livestock in other recovery areas with large bear populations is minor, so payouts in Washington State would likely be small; especially considering that no discernable population exists in the NCE, nor is one expected to take root for some time. The existence of a fund for grizzly bear damages would reassure people who remain uneasy about bears returning to the Northwest.

141. *United States v. McKittrick*, 142 F.3d 1170, 1175 (9th Cir. 1998) (finding that the FWS does have the authority to designate wolves of Canadian origin under the ESA once they cross into United States territory, and to list them as an experimental population for the purpose of killing problem animals).

142. KNIBB, *supra* note 92, at 48.

143. *U.S. Fish and Wildlife Service Announces \$900,000 in Wolf Livestock Demonstration Project Grants*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/news/ShowNews.cfm?ID=B26E9B9D-E900-5B46-086FB7767A53F426>, (Sep. 26, 2014).

144. *Id.*

145. WASH. REV. CODE § 77.36.170 (2013).

Furthermore, there are numerous private organizations, such as the Defenders of Wildlife, that have made it their mission to fund private parties for losses suffered from protected species.¹⁴⁶ The groups reason that by supporting the community harmed by protected animals with damage payouts, resistance to reintroduction of dangerous animals is lowered or minimized.¹⁴⁷ Financial support is just one of many tools available for the furtherance of grizzly bear recovery in Washington State, but it is a significant and very symbolic step towards restoring bears to their former habitat.

VIII. CONCLUSION

Grizzly bears have been a controversial animal and icon since the first settlers began to live amongst them more than 200 years ago. The story of the rise and fall of the great bear is tragic, yet inspiring. An animal brought to the brink of destruction has seen some small victories and is poised for an even greater resurgence. In spite of a legacy of fear and violent rejection of grizzly bears in the United States, there is now a growing movement towards recovery in areas that have not seen sizeable bear populations for over 100 years.

The process of going from one or two isolated pockets of surviving bears, to a population nearly delisted from the ESA, is testimony to the will of those individuals tasked with protecting the bear, and to the adaptability of the bears themselves. Federal programs have provided the framework necessary for protecting the vital habitat required by grizzly bears; the programs developed to ensure protection have proven themselves effective. What remains to be seen is whether those programs can be adapted to regions that are yet untested by the political pressures that come along with grizzly bear reintroduction and by the financial strain put on agencies seeking to implement a recovery plan.

The North Cascade recovery zone in Washington State is a vast area of largely wild and undeveloped natural habitat once patrolled by numerous grizzly bears. The FWS and NPS have begun a process that seeks to potentially put Washington State on the path to grizzly bear recovery, but the way forward is uncertain. History has shown what works for grizzly recovery. Successes elsewhere can be duplicated in Washington State if the decision is made to bring the grizzly home to the Cascades. The state may be opposed to grizzly reintroduction, but the long-term effect of this opposition will run contrary to the goal of controlling bear recovery. If the state hopes to move forward and be a participant in grizzly bear re-

146. Johnson, *supra* note 113, at 12.

147. *Id.*

covery, rather than an observer, it needs to consider overturning current statutory barriers to that end.

The ESA is one of the most powerful environmental laws ever passed in the United States, and it is unlikely that Washington State could successfully withstand efforts made under federal pressure to recover an endangered species. Washington State is home to many animals that have now, or at some time in the past, enjoyed protection under the ESA. The grizzly bear represents what could be the next great challenge to endangered species recovery in Washington State, and it is a fight that no interested group can afford to watch from the sidelines. Experience tells us that recovery under the ESA is much better for citizen and government groups alike when the starting point is cooperation and collaboration, rather than conflict and distrust.

